

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

Everett L. Thomas; Martha A.  
Thomas,

Plaintiffs,

v.

Wells Fargo Bank, N.A.; Wells Fargo  
Bank Home Mortgage; Barrett Daffin  
Frappier & Weiss, LLP; and DOES 1  
through 10, INCLUSIVE,

Defendants.

CASE NO. 3:15-cv-02344-GPC-JMA

**ORDER GRANTING DEFENDANT  
WELLS FARGO BANK, N.A.'s  
MOTION TO DISMISS**

[ECF No. 6]

Before the Court is Defendant Wells Fargo Bank, N.A.'s ("Defendant" or "Wells Fargo") Motion to Dismiss. Def. Mot. Dismiss ("Def. Mot."), ECF No. 3. The motion has been fully briefed. Pl. Resp., ECF No. 12; Def. Reply, ECF No. 13. Upon consideration of the moving papers and the applicable law, and for the reasons set forth below, the Court **GRANTS** Defendant's Motion to Dismiss without prejudice.

**FACTUAL AND PROCEDURAL BACKGROUND**

This case arises out of a \$695,000 loan obtained by Plaintiffs on June 12, 2007 from Defendant's predecessor-in-interest, World Savings Bank, FSB ("WSB"), which was secured by a deed of trust on Plaintiffs' home. ECF No. 1, Ex. B. On July 7, 2009, Plaintiffs obtained a modification on this loan that reduced the

1 principal balance from \$724,920.30 to \$579,936.24. ECF No. 1, Ex. C. Plaintiffs  
2 subsequently defaulted on their loan, and on November 12, 2014, the trustee under  
3 the deed of trust, Defendant Barrett Daffin Frappier Treder & Weiss, LLP,  
4 (“Barrett”), recorded a notice of default. ECF No. 1, Ex. D. Plaintiffs did not cure  
5 their default, and on June 12, 2015, Barrett recorded a notice of trustee sale, which  
6 scheduled a foreclosure sale for July 9, 2015. ECF No. 1, Ex. E.

7 Plaintiff Everett L. Thomas filed for Chapter 7 Bankruptcy on July 7, 2015.  
8 ECF No. 1, Ex. F. This bankruptcy was dismissed without prejudice on July 28,  
9 2015. *Id.* On July 30, 2015, Plaintiffs submitted a loan modification application to  
10 Defendant. Plaintiffs allege that Defendant violated state law by (1) refusing to  
11 provide a single point of contact (“SPOC”) during the loan modification process  
12 and (2) engaging in “dual tracking” by conducting a nonjudicial foreclosure sale of  
13 Plaintiffs’ home while Plaintiffs’ loan modification application was pending.

#### 14 **PROCEDURAL BACKGROUND**

15 On September 1, 2015, Plaintiffs, residents of California, brought suit against  
16 Defendant, a national banking association with its main office located in South  
17 Dakota, in San Diego Superior Court. Notice of Removal 2–5, ECF No. 1. Plaintiffs  
18 alleged violations of (1) Cal. Civ. Code § 2923.7 and (2) Cal. Civ. Code § 2923.6,  
19 and (3) common law breach of contract. *Id.* at 6–9.

20 On October 16, 2015, Defendant removed the case to federal court on the  
21 basis of diversity jurisdiction. Notice of Removal 2. On November 16, 2015,  
22 Plaintiffs filed an ex parte motion for a temporary restraining order (“TRO”) to  
23 restrain Defendant from selling Plaintiffs’ home through a nonjudicial foreclosure  
24 sale, on the basis that such sale would be in violation of a September 9, 2015  
25 temporary restraining order restraining the sale issued by the San Diego Superior  
26 Court. TRO Mot. 2–3, ECF No. 6. Defendant conceded that Plaintiffs’ home had  
27 been sold on November 6, 2015, but argued that the sale was proper because the  
28 TRO had expired no later than 14 days after the case was removed pursuant to Fed.

1 R. Civ. P. Rule 65(b)(2), and Plaintiff had not renewed it. TRO Opp. 3–5. At the  
 2 November 20, 2015 hearing on Plaintiffs’ TRO motion, the Court denied the  
 3 motion, finding that the state court TRO was no longer in effect. ECF No. 11.

4 On October 22, 2015, Defendant filed this motion to dismiss. ECF No. 3. On  
 5 December 3, 2015, Plaintiffs responded. ECF No. 12. On December 10, 2015,  
 6 Defendant replied. ECF No. 13.

### 7 **LEGAL STANDARD**

8 A Rule 12(b)(6) dismissal may be based on either a “‘lack of a cognizable  
 9 legal theory’ or ‘the absence of sufficient facts alleged under a cognizable legal  
 10 theory.’” *Johnson v. Riverside Healthcare System, LP*, 534 F.3d 1116, 1121–22 (9th  
 11 Cir. 2008) (quoting *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.  
 12 1990)).

13 “To survive a motion to dismiss, a complaint must contain sufficient factual  
 14 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”  
 15 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*,  
 16 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads  
 17 factual content that allows the court to draw the reasonable inference that the  
 18 defendant is liable for the misconduct alleged.” *Id.* at 679 (citing *Twombly*, 550 U.S.  
 19 at 556). “Threadbare recitals of the elements of a cause of action, supported by mere  
 20 conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at  
 21 555 (noting that on a motion to dismiss the court is “not bound to accept as true a  
 22 legal conclusion couched as a factual allegation.”). “The pleading standard . . . does  
 23 not require ‘detailed factual allegations,’ but it demands more than an unadorned,  
 24 the defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678 (citations  
 25 omitted). “Review is limited to the complaint, materials incorporated into the  
 26 complaint by reference, and matters of which the court may take judicial notice.”  
 27 *See Metlzer Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1061 (9th Cir.  
 28 2008).

1 In analyzing a pleading, the Court sets conclusory factual allegations aside,  
 2 accepts all non-conclusory factual allegations as true, and determines whether those  
 3 nonconclusory factual allegations accepted as true state a claim for relief that is  
 4 plausible on its face. *Iqbal*, 556 U.S. at 676–84; *Turner v. City & Cty. of San*  
 5 *Francisco*, 788 F.3d 1206, 1210 (9th Cir. 2015) (noting that “conclusory allegations  
 6 of law and unwarranted inferences are insufficient to avoid a Rule 12(b)(6)  
 7 dismissal.”) (internal quotation marks and citation omitted). And while “[t]he  
 8 plausibility standard is not akin to a probability requirement,” it does “ask[] for  
 9 more than a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 556 U.S.  
 10 at 678 (internal quotation marks and citation omitted). In determining plausibility,  
 11 the Court is permitted “to draw on its judicial experience and common sense.” *Id.* at  
 12 679.

## 13 DISCUSSION

### 14 I. Judicial Notice

15 “Although generally the scope of review on a motion to dismiss for failure to  
 16 state a claim is limited to the Complaint, a court may consider evidence on which  
 17 the complaint necessarily relies if: (1) the complaint refers to the document; (2) the  
 18 document is central to the plaintiff[’s] claim; and (3) no party questions the  
 19 authenticity of the copy attached to the 12(b)(6) motion.” *Daniels–Hall v. Nat’l*  
 20 *Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010) (internal quotation marks and  
 21 citations omitted). Fed. R. Evid. 201(b) permits judicial notice of a fact when it is  
 22 “not subject to reasonable dispute because it: (1) is generally known within the trial  
 23 court’s territorial jurisdiction; or (2) can be accurately and readily determined from  
 24 sources whose accuracy cannot reasonably be questioned.” The court may take  
 25 notice of such facts on its own, and “must take judicial notice if a party requests it  
 26 and the court is supplied with the necessary information.” Fed. R. Evid. 201(c).

27 Defendant seeks judicial notice of: (a) WSB’s certificate of corporate  
 28 existence as a federal savings bank, issued by the Office of Thrift Supervision,

1 Department of the Treasury (“OTS”) on April 21, 2006; a November 19, 2007 letter  
2 from OTS authorizing a name change from World Savings Bank, FSB, to Wachovia  
3 Mortgage, FSB (“Wachovia”); Wachovia’s charter, signed by the Director of OTS  
4 on December 31, 2007; a certification from the Comptroller of the Currency stating  
5 that, effective November 1, 2009, Wachovia converted to Wells Fargo Bank  
6 Southwest, N.A., which then merged with Wells Fargo Bank, N.A.; and a printout  
7 from the website of the Federal Deposit Insurance Corporation, showing the history  
8 of WSB; (b) the deed of trust, recorded in the official records of the San Diego  
9 County Recorder’s Office on June 19, 2007; (c) the previous loan modification  
10 agreement between Plaintiffs and Wachovia, dated July 7, 2009; (d) a notice of  
11 default issued by the trustee of the deed of trust, Defendant Barrett, dated November  
12 7, 2014 and recorded in the official records of the San Diego County Recorder’s  
13 Office on November 12, 2014; (e) a notice of trustee’s sale issued by Defendant  
14 Barrett, dated June 11, 2015 and recorded in the official records of the San Diego  
15 County Recorder’s Office on June 12, 2015; (f) the docket for the bankruptcy  
16 petition filed by Plaintiff Everett L. Thomas in the United States Bankruptcy Court  
17 for the Southern District of California on July 7, 2015; and (g) the loan modification  
18 application at issue in the present case. *See* Def. Request for Judicial Notice, ECF  
19 No. 3, Exs. A–G.

20       Neither party questions the authenticity of these documents. The Court finds  
21 that these items are appropriate for judicial notice because they are matters of public  
22 record, the parties do not dispute their authenticity, and they are central to Plaintiff’s  
23 claims. *See, e.g., Hite v. Wachovia Mortgage*, 2010 U.S. Dist. LEXIS 57732, at  
24 \*6–9 (E.D. Cal. June 10, 2010) (judicial notice of same documents concerning the  
25 history of WSB above), *Paralyzed Veterans of Am. v. McPherson*, 2008 U.S. Dist.  
26 LEXIS 69542, at \*17–18 (N.D. Cal. Sept. 8, 2008) (judicial notice of information  
27 appearing on and printed from official government websites); *Gamboa v. Trustee*  
28 *Corps & Cent. Mortgage Loan Servicing Co.*, 2009 U.S. Dist. LEXIS 19613, at

\*4–\*10 (N.D. Cal. Mar. 12, 2009) (judicial notice of recorded documents related to the foreclosure sale, including grant deed and deed of trust). Therefore, the Court **GRANTS** Defendant’s requests for judicial notice. However, the Court also takes judicial notice that the bankruptcy docket proffered by Defendant is incomplete, because it does not include the latest entry on September 16, 2015, which closed the case. *See* Bankruptcy Petition #15-04528-MM7, U.S. Bankruptcy Court for the Southern District of California, ECF No. 24.

## II. Motion to Dismiss

Defendant argues that the case should be dismissed because the claims are preempted by federal law. *See* Def. Mot. 3–7.<sup>1</sup> Plaintiffs respond that no court has held that federal law preempts the application of the California Homeowners Bill of Rights (“HBOR”). Pl. Resp. 11–13. Plaintiffs also argue that the Court lacks subject matter jurisdiction because the amount in controversy is not satisfied. *Id.* at 3.<sup>2</sup>

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<sup>1</sup>Defendant also argues that Plaintiff Everett Thomas’ pending bankruptcy negates Plaintiffs’ claims. Def. Mot. 2–3 (citing *Cloud v. Northrop Grumman Corp.*, 67 Cal. App. 4th 995, 1001 (1998)). However, as Plaintiffs point out, this bankruptcy proceeding was closed on September 16, 2015, and hence can no longer be considered “active” or “pending.” Defendant point to no authority supporting the proposition that a closed bankruptcy proceeding impacts the standing of a debtor.

<sup>2</sup>Plaintiffs also argue that (1) the motion to dismiss is barred by “collateral estoppel” and “res judicata” because the Court is bound by the state court’s prior issuance of the TRO, and (2) the Defendant has “unclean hands” and has committed “fraud on the court.” Pl. Resp. at 3–11. Neither of these arguments withstand scrutiny.

First, Plaintiffs argue that the state court’s determination that Plaintiffs’ case “present[ed] serious questions of law worthy of litigation” for the purposes of granting a TRO bars the Court from determining Defendant’s motion to dismiss. Pl. Resp. 5–7. Plaintiffs cite no authority for the proposition that a state court’s grant of a TRO has any relevance to a federal district court’s determination of a motion to dismiss.

Second, Plaintiffs argue that Defendant has behaved unethically and that Plaintiffs are therefore entitled to equitable relief. Pl. Resp. 7–11. However, the Court finds Plaintiffs accusations to be largely meritless or unsupported. As established at the November 20, 2015 hearing, Defendant did not violate the state court TRO, which lapsed no later than 14 days following the removal of the case to federal court—it was the responsibility of Plaintiffs to file a new TRO before this Court before the state court TRO expired. Plaintiffs accuse Defendant of making false representations to them and colluding with an “entity consisting of former Wells Fargo employees” with whom they “enjoy a ‘special’ relationship” to whom they sold Plaintiffs’ home, but provide no evidence of these assertions. Pl. Resp. 10. Defendant’s statement as of the October 22, 2015 motion to dismiss that Plaintiff’s home had not been foreclosed upon was not a misrepresentation, since at that time Plaintiff’s home had not been sold. *Id.* And while Defendant erred in their description of Plaintiff’s bankruptcy status, the failure to include a single docket entry is not sufficient grounds, standing alone, to support the charge that Defendant has engaged in misconduct with regards to the overall prosecution of the case.

1 Because the Court finds that the Court has subject matter jurisdiction and  
 2 Plaintiffs' state law claims are preempted by the federal Home Owners' Loan Act,  
 3 the Court **GRANTS** the motion to dismiss.<sup>3</sup>

4 **A. Subject Matter Jurisdiction**

5 Plaintiffs argue that the Court lacks subject matter jurisdiction because the  
 6 amount in controversy does not meet the \$75,000 jurisdictional requirement. *Id.* at  
 7 3. Plaintiffs argue that they seek damages for two counts of violations of Cal. Civ.  
 8 Code. § 2923, which caps damages at \$25,000 per violation, and thus seeks no more  
 9 than \$50,000 in damages. *Id.* at 3–4. Defendants reply that although Plaintiffs only  
 10 seek \$50,000 in monetary damages, they also seek injunctive relief concerning the  
 11 foreclosure of their home, in which Defendant has a secured interest arising from  
 12 the \$695,000 loan. Def. Reply 2.

13 It is well-established that where injunctive relief is sought, “the amount in  
 14 controversy is measured by the object of the litigation.” *Major v. Wells Fargo Bank,*  
 15 *N.A.*, 2014 WL 4103936, at \*1 (S.D. Cal. Aug. 18, 2014) (citing *Cohn v. Petsmart,*  
 16 *Inc.*, 281 F.3d 837, 840 (9th Cir. 2002)). Moreover, “in actions arising out of the  
 17 foreclosure of a plaintiff's home, the amount in controversy may be established by  
 18 the value of the property or by the value of the loan.” *Id.* (citing *Chapman v.*  
 19 *Deutsche Bank Nat'l Trust Co.*, 651 F.3d 1039, 1045 n.2 (9th Cir. 2011) (“The  
 20 object in litigation is the Property, which was assessed at a value of more than  
 21 \$200,000, and therefore satisfies the amount-in-controversy requirement.”); *Ngoc*  
 22 *Nguyen v. Wells Fargo Bank, N.A.*, 749 F. Supp. 2d 1022, 1028 (N.D. Cal. 2010)

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 24 <sup>3</sup>Since the Court so finds, the Court need not address Defendant's additional arguments that  
 25 (1) the first claim regarding SPOC should be dismissed because Plaintiff's claim lacks particularity,  
 26 the allegations show Defendant satisfied the requirements of § 2923.7 when assigning a “team” to  
 27 serve as the SPOC, and any violation of § 2923.7 was not material; (2) the second claim regarding dual  
 28 tracking should be dismissed because Defendant's alleged actions did not constitute dual tracking, §  
 2923.6 applies only to a first loan modification, not a subsequent loan modification, and Plaintiffs had  
 not demonstrated a material change in financial circumstances; and (3) the third claim regarding breach  
 of contract should be dismissed because Plaintiffs may not base an implied covenant of good faith  
 claim on statutory duties imposed on the Defendant, nor a contract duty that exceeds what is in the  
 parties' contract. *See* Def. Mot. 7–12.

1 (“Numerous courts have held that, where a complaint seeks to invalidate a loan  
2 secured by a deed of trust, the amount in controversy is the loan amount.”)).

3 In this case, the deed of trust indicates that Plaintiffs initially borrowed  
4 \$695,000 against their home, far exceeding the \$75,000 threshold for diversity  
5 jurisdiction. ECF No. 1, Ex. B. Following the loan modification, the balance of the  
6 loan was adjusted downwards, but only to \$579, 936.24. ECF No. 1, Ex. C.  
7 Plaintiffs do not allege that the value of the home has dropped below \$75,000. Thus,  
8 Defendant has established by a preponderance of the evidence that the amount in  
9 controversy exceeds \$75,000. *See Sanchez v. Monumental Life Ins. Co.*, 102 F.3d  
10 398, 404 (9th Cir. 1996) (holding “that in cases where a plaintiff’s state court  
11 complaint does not specify a particular amount of damages, the removing defendant  
12 bears the burden of establishing, by a preponderance of the evidence, that the  
13 amount in controversy exceeds” the statutory requirement).

#### 14 **B. Federal Preemption**

15 Defendants argue that Plaintiffs’ state-law claims are preempted by the  
16 federal Home Owners’ Loan Act (“HOLA”). Def. Mot. 3–7. Federal savings  
17 associations, including federal savings banks, are subject to HOLA and are  
18 regulated by the Treasury Department’s Office of Thrift Supervision (“OTS”).  
19 *Osorio v. Wachovia Mortgage, FSB*, 2012 WL 1610110, at \*3 (S.D. Cal. May 8,  
20 2012) (citing 12 U.S.C. § 1464; *Silvas v. E\*Trade Mortg. Corp.*, 514 F.3d 1001,  
21 1005 (9th Cir. 2008)).

22 Under HOLA, the OTS enjoys “plenary and exclusive authority . . . to  
23 regulate all aspects of the operations of Federal savings associations” and its  
24 authority “occupies the entire field of lending regulation for federal savings  
25 associations.” 12 C.F.R. §§ 545.2, 560.2(a). The Ninth Circuit has stated that the  
26 enabling statute and subsequent agency regulations are “so pervasive as to leave no  
27 room for state regulatory control.” *Conference of Fed. Sav. & Loan Ass’ns v. Stein*,  
28 604 F.2d 1256, 1260 (9th Cir.1979), *aff’d*, 445 U.S. 921 (1980). OTS Regulation

560.2(b) expressly preempts state regulation of federal thrift activities dealing with, *inter alia*, terms of credit, loan-related fees, servicing fees, disclosure and advertising, loan processing, loan origination, and servicing of mortgages. 12 C.F.R. § 560.2(b). Federal courts have held that claims for violations of Cal. Civ. Code. §§ 2923.6 and 2923.7, the provisions of the California Homeowner Bill of Rights (“HBOR”) at issue here, are preempted by HOLA. *See Sato v. Wachovia Mortg., FSB*, 2011 U.S. Dist. LEXIS 75418, at \*19–20, 2011 WL 2784567 (N.D.Cal. Jul. 13, 2011) (finding claim that lender violated California Civil Code § 2923.6 by failing to modify her loan preempted by HOLA); *see also Campos v. Wells Fargo Bank, N.A.*, No. CV151200JVSDTBX, 2015 WL 5145520, at \*7 (C.D. Cal. Aug. 31, 2015) (citing *Meyer v. Wells Fargo Bank, N.A.*, No. C 13-03727 WHA, 2013 WL 6407516, at \*4 (N.D. Cal. Dec. 6, 2013); *Marquez v. Wells Fargo Bank, N.A.*, No. C 13-2819 PJH, 2013 WL 5141689, at \*5 (C.D. Cal. Sept. 13, 2013)).


Plaintiff’s loan originated with WSB, a federal savings bank that was subsequently acquired by Defendant Wells Fargo, a national banking association. A majority of district courts to address the issue have found that “HOLA preemption continues to apply to conduct related to loans originated by a federally-chartered savings association even after those banks are merged into national banking associations.” *See, e.g., Campos*, 2015 WL 5145520, at \*5 (citation omitted); *Penermon v. Wells Fargo Bank, N.A.*, 47 F. Supp. 3d 982, 995 (N.D. Cal. 2014) (acknowledging that holding otherwise constitutes the “minority view”).

Therefore, the Court concludes that Plaintiffs’ claims for violation of California Civil Code §§ 2923.6, and 2923.7 are preempted by HOLA. Moreover, Plaintiffs’ state law breach of contract claim is based on the SPOC and dual tracking allegations, rather than any conduct of the Defendant unrelated to these contested provisions of HBOR. *See* Compl. 9. Thus, Plaintiffs’ state law claims are

**DISMISSED WITH PREJUDICE.**



1 DATED: January 14, 2016

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4 HON. GONZALO P. CURIEL  
5 United States District Judge  
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